IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

No. 83-340

J.W. GREER, Warden,
Menard Correctional Center,

Petitioner,

v.

JOHN STEPHAN PARISIE,

Respondent.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS THE SEVENTH CIRCUIT

# BRIEF IN OPPOSITION

Jeffrey S. Bork
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Court-appointed attorney for
respondent John Parisie

OF COUNSEL:

GEORGE W. JONES, JR.

SIDLEY & AUSTIN

Dated: September 21, 1983

## QUESTION PRESENTED

Whether the notice of appeal in this case was timely filed as so held by the Court of Appeals on four separate occasions.

## INDEX


| | Page |
|---|---|
| STATEMENT OF THE CASE . . . . . | 1 |
| REASONS FOR DENYING THE PETITION . . . . . | 2 |
| CONCLUSION . . . . . | 5 |


## CITATIONS

CASES:


| | |
|---|---|
| Alley v. Dodge Hotel, 551 F.2d 442 (D.C. Cir.), cert. denied, 431 U.S. 958 (1977). . . . . | 3 |
| Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978). . . . . | 2 |
| Browder v. Illinois Department of Corrections, 434 U.S. 257 (1978). . . . . | 4 |
| Dove v. Codesco, 569 F.2d 807 (4th Cir. 1978) . | 3 |
| Foman v. Davis, 371 U.S. 178 (1962) . . . . . | 3 |
| Griggs v. Provident Consumer Discount Co., 74 L. Ed. 2d 225 (1982) . . . . . | 4 |
| Haines v. Kerner, 404 U.S. 519 (1972) . . . . . | 3 |
| Nixon v. Fitzgerald, 73 L. Ed. 2d 349 (1982) . | 4 |
| Sea Ranch Association v. California Coastal Zone Conservation Commission, 537 F.2d 1058 (9th Cir. 1976) . . . . . | 3 |
| Thompson v. Immigration & Naturalization Service, 375 U.S. 384 (1964) . . . . . | 3 |
| United States v. Indrelunas, 411 U.S. 216 (1973). . . . . | 2 |
| Wolfson v. Hankin, 376 U.S. 203 (1964). . . . . | 3 |

STATUTES & RULES:


United States Code:

28 U.S.C. § 1291 . . . . . 2

Federal Rules of Civil Procedure:

Rule 6(b) . . . . . 2,3

Rule 8(f) . . . . . 3

Rule 58 . . . . . 2

Rule 59(e) . . . . . 2,3

Rule 60(b) . . . . . 3,4

Federal Rules of Appellate Procedure:

Rule 4(a)(4) . . . . . 3

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

No. 83-340

J.W. GREER, Warden,
Menard Correctional Center,

Petitioner,

v.

JOHN STEPHAN PARISIE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts pertinent to the State's petition for writ of certiorari are succinctly set forth by Judge Swygert in his opinion below, Parisie v. Greer, 705 F.2d 882, 895 (7th Cir. 1983)(Pet. App. at 27):

> The district court granted the state's motion for summary judgment on December 18, 1979. On December 27, 1979, Parisie acting pro se, mailed a motion to extend the time for filing a motion to reconsider, on which the court never ruled. The basis for this request, to which the state did not object, was Parisie's lack of access to the prison law library because of abbreviated holiday hours. Parisie filed his motion to reconsider on February 1, 1980, and the district court denied it on the merits on May 8, 1980. Parisie filed a notice of appeal on June 2, 1980.

On appeal the State argued that Parisie's post-judgment motions were untimely and, therefore, his notice

of appeal was untimely as well.* The Court of Appeals rejected this jurisdictional argument in (1) its order denying the State's motion to dismiss for want of jurisdiction (Pet. App. at 81), (2) the original panel decision (id. at 62), (3) the order denying rehearing (id. at 46), and (4) the en banc order under review here (id. at 1).

## REASONS FOR DENYING THE PETITION

1. Because the District Court failed to enter judgment "on a separate document" as expressly required by Fed. R. Civ. P. 58, the time for filing a notice of appeal never began. See United States v. Indrelunas, 411 U.S. 216 (1973). Thus, it is apparent that Parisie's notice of appeal was timely. Because the failure to enter judgment on a separate document does not affect the "finality" of the judgment for purposes of 28 U.S.C. § 1291, see Bankers Trust Co. v. Mallis, 435 U.S. 381, 386 n.7 (1978), the Court of Appeals correctly held that it had jurisdiction.

Even if the District Court had entered judgment on a separate document, Parisie's pro se post-judgment motions would have tolled the time for filing a notice of appeal. Nine days after the District Court granted the State's motion for summary judgment, Parisie moved to extend the time within which to file a motion for reconsideration (see Fed. R. Civ. P. 59(e)). No such extensions may be granted (see Fed. R. Civ. P. 6(b)), but Parisie's failure to notice

* Both the State's appellate brief and its petition for rehearing with suggestion for rehearing en banc, in which the State advanced its "timeliness" argument, were themselves untimely filed (see Parisie, supra, 705 F.2d at 898 n.5; Pet. App. at 33 n.5).

the Rule 6(b) provision is certainly understandable. Neither the State nor the District Court raised any question as to the timeliness of the motion.* Under the circumstances, Parisie's motion for an extension of time should be deemed a motion for reconsideration under Rule 59(e). See Haines v. Kerner, 404 U.S. 519 (1972); Foman v. Davis, 371 U.S. 178 (1962). On this view, Parisie's supporting memorandum may have been late, but that would not affect the tolling of the time for filing a notice of appeal (see Fed. R. App. P. 4(a)(4)).**

Indeed, the District Court's actions suggest strongly that it treated the motion for an extension of time as a timely motion for reconsideration, which was to be followed by a supporting memorandum. The experienced District Court judge doubtless was aware of the limitations imposed by Rule 6(b). Yet, he never ruled on the motion for an extension of time, and he denied the motion to reconsider on the merits, and not on the ground of untimeliness (see Pet. App. at 91). See Wolfson v. Hankin, 376 U.S. 203 (1964); Thompson v. Immigration & Naturalization Service, 375 U.S. 384 (1964).

---

* Had the State objected, the District Court undoubtedly would have advised Parisie of Rule 6(b), and there would still have been sufficient time for Parisie to have filed a notice of appeal within 30 days of the December 18, 1979 order.

** It is irrelevant that Parisie ultimately styled his pro se motion to reconsider as one under Rule 60(b) rather than Rule 59(e). See, e.g., Browder v. Illinois Department of Corrections, 434 U.S. 252, 272 (1978)(Blackmun, J., concurring); Dove v. Codesco, 569 F.2d 807, 809 (4th Cir. 1978); Alley v. Dodge Hotel, 551 F.2d 442, 444-45 n.14 (D.C. Cir.), cert. denied, 431 U.S. 958 (1977); Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'n, 537 F.2d 1058, 1061 (9th Cir. 1976). See also Fed. R. Civ. P. 8(f)("All pleadings shall be construed as to do substantial justice").

However Parisie's motion is characterized, it is plain that the Court of Appeals had jurisdiction in this case. Under Fed. R. Civ. P. 60(b)(6), a motion to vacate a judgment may be made at any "reasonable time" after the judgment. Parisie's motion was clearly filed within a reasonable time after judgment, and his notice of appeal was filed within 30 days after that motion was denied. Accordingly, at the very least, the Court of Appeals had jurisdiction to review the District Court's denial of the motion for abuse of discretion. See, e.g., Browder v. Illinois Department of Corrections, 434 U.S. 257, 263 n.7 (1978); see also, id. at 272-274 (Blackmun, J., concurring).

2. The State's reliance on Browder, supra, is wholly misplaced. As this Court recently observed, "It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'" Griggs v. Provident Consumer Discount Co., 74 L. Ed. 2d 225, 230 (1982), quoting Browder, supra, 434 U.S. at 264. Nothing in the holding of the Court of Appeals is to the contrary. The only question presented by the State's petition here is whether Parisie's notice of appeal was timely. For the reasons already stated, it is clear beyond any serious dispute that it was. Since the State prevailed on the merits, it has no basis for complaining of the standard of review, which might differ depending on the theory of jurisdiction.

3. If the Court grants Parisie's petition for a writ of certiorari, No. 83-5300 (filed Aug. 25, 1983), the State will be free to raise its jurisdictional arguments. See, e.g., Nixon v. Fitzgerald, 73 L. Ed. 2d 349, 358

(1982). If the Court denies that petition, there is no reason to consider the question of the "correct" jurisdictional theory. Indeed, it is somewhat difficult to understand the State's interest in independently pursuing this abstract question of law. The State prevailed in both the District Court and the Court of Appeals and therefore vacating the judgment below would be of little consequence to either party.

## CONCLUSION

The petition for a writ of certiorari to the Court of Appeals, therefore, should be denied.

Respectfully submitted,

Jeffrey S. Bork
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

OF COUNSEL:
GEORGE W. JONES, JR.
SIDLEY & AUSTIN

Dated: September 21, 1983

PROOF OF SERVICE

Jeffrey S. Bork, an attorney, certifies that he caused two copies of the foregoing Brief in Opposition to be mailed, with first-class postage prepaid, this 21st day of September, 1983.

Michael V. Accettura, Esquire
Assistant Attorney General
State of Illinois
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601

Jeffrey S. Bork

FILED
SEP 21 1983
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

No. 83-340

J.W. GREER, Warden,
Menard Correctional Center,

Petitioner,

v.

JOHN STEPHAN PARISIE,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent John Parisie moves this Court for an order permitting him to proceed in forma pauperis. The undersigned was appointed pursuant to the Criminal Justice Act of 1964, as amended, by the United States Court of Appeals for the Seventh Circuit to represent respondent in that Court and, because of his familiarity with the record, respondent desires that he be reappointed in this proceeding. Respondent has consented to the undersigned's continued representation.

Respectfully submitted,

Jeffrey S. Bork
SIDLEY & AUSTIN
1722 Eye Street, N.W
Washington, D.C. 20006
(202) 429-4000

Court-appointed attorney for
John Parisie in U.S. Court of
Appeals for the Seventh Circuit.